92-869

Supreme Court, U.S.
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No. ______________________________

IN THE UNITED STATES SUPREME COURT

October Term, 1992,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HOFFMAN CONSTRUCTION COMPANY OF OREGON,
an Oregon Corporation,
Plaintiff, Appellee, Respondent,
v.
ACTIVE ERECTORS & INSTALLERS, INC.,
A Washington Corporation
Defendant, Appellant, Petitioner.

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QUESTIONS PRESENTED FOR REVIEW

1. Under section 4 of the Federal Arbitration Act, 9 U.S.C. §4, must procedural objections to arbitration that relate to matters that are arbitrable under arbitration clauses of contracts between the parties be referred to the arbitrators, as required in the Second and Eleventh Circuits or may these procedural objections to arbitration be decided by federal district courts as allowed by the Ninth Circuit? In this case the lower courts decided that the Petitioner was precluded by state litigation from pursuing its arbitration of its RICO claims. The lower courts refused to either stay this federal court action or dismiss it and refer all matters to arbitration as requested by the petitioner. Instead, the lower courts selectively applied (as pointed out by the

dissent) some judicial rules of preclusive procedure without reference to the arbitration clause of the contract, to enjoin the further proceeding of the Petitioner with arbitration of disputes between it and Respondent. Included within this question is whether or not judicial- procedural rules of preclusion even apply where parties seek to arbitrate any portion of disputes under arbitration clauses of contracts that have not been previously arbitrated or litigated where the rules justifying awards in arbitration may well not be the same as those that would support judgments in courts that are accorded full faith and credit under our system of justice.

2. May good faith, inadvertent and innocent procedural missteps in new or previously undecided areas of law be

utilized under the procedural rules to deny hearings on the merits? In this case Petitioner first filed its RICO claims in a Federal District Court filed in December, 1984, while it sought to arbitrate its other claims in Seattle in February, 1985, pursuant to the disputes resolution clause in Respondent's printed form contract. The arbitration was enjoined, at Respondent's request pursuant to other sections of the same disputes resolution clause, by the Alaska Superior Court. Petitioner was required to proceed in that court by counterclaim on its other claims that included a fraud claim in order to establish its basic damages claims. However, petitioner withheld the RICO claims from arbitration and the state court action under the then widely held but now mistaken legal opinions that the federal courts had exclusive jurisdiction over them and/or they were not arbitrable. Petitioner continued to withhold those claims from the state court action through the trial of that action that occurred before there was a ruling in the Ninth Circuit that state courts had concurrent jurisdiction over those claims. However, Petitioner was amenable to arbitration of those disputes after this court ruled that such disputes were arbitrable on June 8, 1987 in Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185. However, Peitioner was still under a state court injunction from arbitrating them. That State court action has now been ruled as preclusive of further presentation of the RICO claims.

3. Should the Federal Courts reject the procedural skill game, just as they rejected the pleading skill game, where

one misstep denies the looser a hearing on the merits?

4. Do federal courts have any statutory or other right to rule that state court findings and judgments, or for that matter federal court findings and judgments, are preclusive of arbitration proceedings where such claims would otherwise be encompassed within the scope of an arbitration clause of a contract that is protected by the Federal Arbitration Act; at least in so far as any claims that might be considered by arbitration that were not actually considered and decided in such federal or state court proceedings?

PARTIES

All parties are listed in the title.

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JURISDICTIONAL GROUNDS

The decision was filed on July 8, 1992 and the timely filed motion for reconsideration was denied by a majority of the panel on August 20, 1992, though Judge Reinhardt would have granted the same.

STATUTES INVOLVED IN THE CASE

The following statutes are involved in the case and their pertinent texts are set forth the in the appendix hereto:

9 U.S.C. §3; 9 U.S.C. §4; 18 U.S.C. §1341; 18 U.S.C. §1961; 18 U.S.C. §1962; 18 U.S.C. §1964; 28 U.S.C. §1331; 28 U.S.C.

§1332(a)(1); 28 U.S.C. §1738; 28 U.S.C. §2201(a); 28 U.S.C. §2202.

STATEMENT OF THE CASE

1. NATURE OF CASE.

Hoffman Construction Company of Oregon (Hoffman hereinafter) sought to enjoin Active Erectors & Installers, Inc., (Active hereinafter) from proceeding with arbitration before the American Arbitration Association of its civil RICO (18 U.S.C. § 1961 et. seq.) claims arising from the performance of written subcontract by Active with Hoffman containing an arbitration clause on the grounds that such action was precluded by former judgment in state court on collateral matters. Active moved to compel arbitration. The district court permanently enjoined Active from arbitration while refusing to compel Hoffman to arbitrate.

The case is a continuation of a dispute previously reported in Sparling v. Hoffman Construction Co., 864 F.2d 635 (9 Cir. 1988). Both Active and Hoffman were parties to that case.

2. FACTS RELEVANT TO ISSUES.

The disputes arose out of the subcontract work of Active for Hoffman primarily for the structural steel construction of the $28 million Homer, Alaska, high school and community center complex under a prime contract with the Borough of Kenai, Alaska (hereinafter referred to as the Borough). Hoffman was the prime contractor and CTA Architects and Engineers (CTA hereinafter) was the architect for the Borough.

Active first joined with Mr. Michael J. Sparling, sole stockholder and guarantor of Active, in a suit against Hoffman in the United States District Court for Western Washington on December 6, 1984. The initial suit was to enjoin enforcement of certain bond claims against Active and Mr. Sparling for work and supplies furnished Active for use in the construction of the Homer complex pending litigation of the disputes between Hoffman and Active and to award Mr. Sparling damages for Hoffman's actions. Originally Active asked for no monetary damages.

Pursuant to the disputes resolution clause (Appendix xci - xcvi), and in timely response to Hoffman's denial of Active's claims, on February 4, 1985, Active filed a demand for arbitration of its contract disputes with the American Arbitration Association.

Very early Active and Mr. Sparling filed a motion to amend their complaint by adding RICO claims against Hoffman. In the lodged amended complaint filed February 13, 1985, Active requested damages under the RICO allegations. The Ninth Circuit finally decided on December 21, 1988, in Sparling v. Hoffman Construction Company, 864 F.2d 635, 638, that the district court had erred in not allowing that amendment to the complaint.

However, the Ninth Circuit ruled that the district court was justified in dismissing the case on the grounds that the matter should have been arbitrated in any event, rather than remanded for a stay order pending arbitration as prayed for by Active. Since all matters in November, 1988 would have required arbitration, the question of whether or not Active should have been allowed to amend its complaint in 1985 was considered mute.

After Active filed for arbitration against Hoffman, Hoffman sued Active and others in the Alaska State courts on February 22, 1985 to enjoin arbitration. On April 11, 1985 that court did enjoin Active from pursuing arbitration of any claims that Active might have against Hoffman which were on account of acts or omissions of Kenai Peninsula Borough or its representatives. Active initially followed Hoffman's lead and indicated in arbitration that the owner might be responsible for some of the damages. It did not pursue that claim in the subsequent Alaska Superior Court action commenced by Hoffman. It did make a tort claim for defective plans against CTA and did get a judgment on that tort claim against CTA but that judgment constituted no claim against the Borough.

The Borough was also a defendant in the state court action brought by Hoffman. CTA Architects & Engineers, Inc., was the architect for the Kenai Peninsula Borough and became a party to that action, along with Industrial Indemnity Company (Active's surety), Foss Alaska Line, CTA Architects of Alaska, Inc., and Seaboard Surety Company (Hoffman's surety).

Hoffman alleged in its state court injunction action that Active's basic damage claims involved the Borough. Because Hoffman had alleged these claims also involved the Borough and Hoffman opposed arbitration, Active finally agreed to try its basic damage claims in that state court action and it was the successful judgment on Active's counterclaims in that lawsuit initiated by Hoffman, particularly on fraud, that were found in the second federal court action to be preclusive of arbitration of the RICO claims. Active never made any RICO claims against the Borough or its representatives and never presented the RICO claims in the state court action.

The district court in the Western Washington State dismissed the Active from litigation on May 22, 1985, without consideration of the RICO claim or the motion to amend the complaint and then transferred the Sparling suit to Alaska. That dismissal was not a final order. The entire case was not dismissed, and the denial to amend the complaint was not ruled upon and an appeal was not possible until the final orders of November 12, 1987 were entered by the Alaska District Court.

Active's former federal court case against Respondent under its RICO allegations was still pending months after the Alaska Superior Court trial was completed on the collateral issues that have now been ruled as preclusive by the

Ninth Circuit. The State trial took place between July 6 and August 13th, 1987.

From April 11, 1985 until March 10, 1988, Active was effectively enjoined from arbitrating the monetary value of any basic damage claims that Active might have against Hoffman because all of those damage claims were alleged by Hoffman to result from the acts or omissions of Kenai Peninsula Borough or its representatives.

Active was legally barred from arbitrating the RICO case from February 22, 1985 until March 10, 1988. The Ninth Circuit even supported that position in December 1988 when it refused to reverse the district court and order the matter stayed pending arbitration, as requested by Active in that case.

On April 15, 1985, Active wrote to Hoffman that it would agree to bring its actions in state court that were pending in arbitration except for the Shareholders suits and the RICO claims that were still pending in federal court.

In 1985 Active had ample reason for withholding RICO claims from the state court action. There was no Alaska case law allowing RICO claims to be brought in state court. Furthermore, a number of contemporaneous cases were saying that Federal Courts enjoyed exclusive jurisdiction over RICO cases (Cook County v. Midcom Corp., 574 F.Supp. 902 [N.D. Il. 1983]; aff'd on other grounds, 773 F.2d 892 [7th Cir. 1985]; Maplewood Bank & Trust Co. v. Acorn, Inc., 504 A.2d 819 [N.J.Super.St. 1985]; Kinsey v. Nestor Exploration, Ltd., 604 F.Supp. 1365 [E.D. Wash. 1985]; Cinaci v. Superior Court, 40 Cal.3rd 903, 221 Cal.Rptr. 575, 710 P.2d 375 [1985]; Main Rusk Associates v. Interior Space Constructors, Inc., 699

S.W.2d 305 [Tex.Cv.App. 1985].

Furthermore, until shortly before the trial of the Alaska Superior Court Action, a number of courts continued to hold that RICO claims were not arbitrable: S.A. Minercao Da Trindade-Samitri v. Utah Int'l, Inc., 576 F.Supp. 566, ammended, 579 F.Supp. 1049 (S.D.N.Y. 1983) Aff'd 745 F.2d 190, 192 (2nd Cir. 1984); Witt v. Merril Lynch, Inc., 602 F.Supp. 867, (W.D.Pa. 1985); Universal Marine Ins. co. v. Beacon Ins. Co., 588 F.Supp. 561, (W.D.N.C. 1984); Wilcox v. Ho-Wing Sit, 596 F.Supp. 561, (N.D.Cal. 1984); McMahon v. Shearson/American Express, Inc., 788 F.2d 94 (CA 2, 1986); Tashea v. Bache, Halsey, Stuart, Shields, Inc., 802 F.2d 1337 (CA 11 1986); Page v. Moseley, Hallgarten, Estabrook & Weeden, Inc., 806 F.2d 291 (CA 1, 1986); Driscoll v. Smith, Barney, Harris, Upham & Co., 815 F.2d 655

(CA 11, 1987).

The question of whether or not Federal courts enjoyed exclusive jurisdiction over RICO actions continued to be debatable throughout the country until this court's decision on June 8, 1987 in Shearson/-American Express, Inc. v. McMahon, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185. Then this court announced that RICO cases may be arbitrated. This settled undecided law in the 9th circuit as to arbitration but still did not settle whether State Courts might also have jurisdiction over RICO claims.

Unfortunately, Shearson was more than a month after the last day for filing dispositive motions in the Alaska Superior Court case between Hoffman and Active and in any event Active was still legally enjoined from arbitration at that time. Furthermore, under the same pretrial orders, time for filing motions for amending claims and the granting of the same had, presumably, well expired.

From July 6 through August 13, 1987 the Alaska State Superior Court case, including the contract and fraud disputes between Active and Hoffman, was tried before Judge Brian Shortell, sitting without jury. That case also involved claims between and among CTA, Hoffman, the Borough, Seaboard Surety Company, and Industrial Indemnity Company for various contract breaches. The case did not involve criminal elements of the RICO mail or wire fraud claims which only concerned Hoffman.

On November 12, 1987 a final judgment of dismissal in the Alaska U.S. District Court was rendered on the Active RICO Federal Court case. That court refused to stay the federal court case pending arbitration, even though the federal courts had gained prior jurisdiction over the RICO claims by reason the first filing, dating from December, 1984.

Coincidentally, on November 12, 1987, in Lou v. Belzberg, 834 F.2d 739 the Ninth Circuit decided that state courts do indeed have concurrent jurisdiction over RICO claims. This was three months after completing a full multiparty trial on collateral matters.

On November 23, 1987, Active moved in federal district court to reconsider the dismissal of the RICO claims. This was supported by an affidavit containing copies of proposed state court findings of fact and conclusions of law including the fraud finding. This was shortly supplemented by those state court findings of fact of Judge Shortell entered on December 3, 1987.

On December 22, 1987, Active appealed the federal court dismissal to the Ninth Circuit.

On March 10, 1988, the Alaska Superior Court finally entered judgment for Active against Hoffman and CTA, jointly and severally based upon the December 3, 1987 findings and conclusions. This judgment, by its entry, effectively dissolved the arbitration injunction.

From April 11, 1985 until March 10, 1988, Active had been enjoined from arbitrating any claims that Active might have against Hoffman which were on account of acts of omissions of the Borough or its representatives. CTA was the Borough's architect and thus, arguably, one of the Borough's representatives. However, Active actually recovered judgment directly against CTA on tort theories similar to those developed for products liability. The Borough was never involved in Active's state trial claims, only in Hoffman's claims (against which the Borough had substantial counterclaims).

March 12, 1988: U.S. District Court for Alaska entered order stating it would have denied motion to reconsider dismissal of Active's RICO case.

During this whole time, the federal courts including this court, were considering and deciding important procedural questions on how and where to present RICO claims; that is, could they be brought in arbitration and in State court.

When Active began its actions in 1984 and 1985, there was considerable opinion and some authority that said that neither state forums nor arbitration were appropriate for bringing RICO claims, so Active's continuation of those claims in

Federal Court was not only justified as an appropriate choice of forum but was really the only safe forum. If the courts ever decided arbitration was proper, then one would presume the Federal Courts would have stayed the pending RICO action pending arbitration. But not in the Ninth Circuit as it would prove.

Furthermore, the contract drawn by Hoffman with its subcontractors, including Active, provided for bifurcation of causes of action against Hoffman by its subcontractors (see Appendix, pages xci-xcvi).

On November 3, 1988, the Ninth Circuit heard argument on the Active appeal of RICO dismissal. The Ninth Circuit had before it a full copy of the findings of fact and conclusions of law entered by Judge Brian Shortell in the Alaska State Superior Court action between Active and

Hoffman.

On December 21, 1988, the Ninth Circuit filed its opinion in the first Active RICO appeal. In that opinion the Ninth Circuit dealt with Active's argument that Hoffman had waived its right to arbitrate the RICO claims thusly:

> "Fifth, Active argues that dismissal was improper because Hoffman waived arbitration in favor of proceedings in Alaska State Court. The arbitration clause in the contract states that it may be waived if the parties mutually agree, the scope of such waiver would be governed by the agreement. Hoffman only waived the arbitration clause in favor of ongoing state court proceedings, not the federal action."

Sparling v. Hoffman Construction Co., 864 F.2d 635, 639 (9 Cir. 1988). Active has never conceded that it mutually agreed to waive its rights to present its RICO claims by arbitration, if Arbitration was required of such claims, but only the dissenting opinion in the second Ninth Circuit case ever even addressed this issue.

On January 12, 1989 Active filed for arbitration against Hoffman Construction Company with the American Arbitration Association its RICO claims previously subject solely to the above described federal court action Sparling v. Hoffman Construction Co., 864 F.2d 635 (9 Cir. 1988). See Appendix, page xcvii to ci, for allegations filed in arbitration.

INITIAL JURISDICTION IN FEDERAL COURTS

a. Jurisdiction of the district court was alleged by Respondent based upon 28 U.S.C. § 1332(a)(1) in that the plaintiff and the defendant were citizens of different states and the amount in controversy exceeded $10,000.00. These two facts are not in dispute but Petitioner disputed the conclusion that jurisdiction was thereby assured where claims are subject to mandatory arbitration, 9 U.S.C. §§ 3 and 4.

b. Jurisdiction of the district court was alleged by Respondent as a result of appellant's claim in arbitration under the RICO allegations involving a federal question cognizable under 28 U.S.C. § 1331. Petitioner disputed that jurisdiction was assured under said statute where the claims are subject to mandatory arbitration 9 U.S.C. §§ 3 and 4.

c. Jurisdiction of the district court was alleged by Respondent because Petitioner's claims against Respondent in arbitration are covered by 18 U.S.C. § 1964.

Petitioner disputed that jurisdiction was assured under said statute where the claims are subject to mandatory arbitration 9 U.S.C. §§ 3 and 4.

d. Jurisdiction of the district court was alleged by Respondent pursuant to 28 U.S.C. § 2201 and 28 U.S.C. § 2202 granting the federal district courts power to grant declaratory relief together with injunctive and other appropriate relief. Petitioner disputed that either said statutes granted jurisdiction over this case and further, that even if jurisdiction could be found from such remedial statutes, Petitioner disputed that district court jurisdiction was assured under said statute where the claims are subject to mandatory arbitration 9 U.S.C. §§ 3 and 4.

e. Petitioner contended that the jurisdiction of the district court was only appropriate to dismiss or stay the federal court proceedings pending outcome of the existing arbitration, and that said district court had no jurisdiction to consider or decide any disputed facts between the parties, 9 U.S.C. §§ 3 and 4, Sparling v. Hoffman Construction Co., 864 F.2d 635 (9 Cir. 1988).

f. This petition for certiorari is to review the decision rendered in by the Ninth Circuit in an appeal from a final decision of district court pursuant to 28 U.S.C. § 1291 (CR 36). That appeal was from a final judgment Rule 54(a)(b) (CR 37).

g. A preliminary injunction enjoining Active Erectors & Installers, Inc., from proceeding against Hoffman Construction Company in arbitration was filed on November 8, 1989 (CR 25). An order consolidating the trial on the merits with the already held hearing on the preliminary injunction was filed on April 3, 1990 (CR 29). Findings of Fact, Conclusions of Law and directions to enter Partial final Judgment was filed on May 23, 1990 (CR 36). Judgment was filed on June 1, 1990 (CR 37). Notice of Appeal was file on June 26, 1990 (CR 39). Order allowing attorney fees and directing the clerk to enter an amended form of judgment was filed on July 31, 1990 (CR 42) and the clerk amended the form of judgment and filed the same nunc pro tunc. An amended notice of appeal was filed August 6, 1990 (CR 43).

ARGUMENT

1. MANDATORY ARBITRATION

The Second Circuit is very clear on mandatory arbitration, "regardless of any procedural defenses..." where there is an arbitration clause, the district court is required, mandated, to refer the dispute to arbitration, Conticommodity Services v. Philipp & Lion, 613 F.2d 1222, 1225 (1980). This was reconfirmed in the case of Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114, 121 (2nd Cir, 1991). The court must first decide, according to the Second Circuit, if the case falls within or without the arbitration clause. If it does, then all procedural defenses are referred to the arbitrators. The Eleventh Circuit has agreed with the Second Circuit, see Belke v. Merril, Lynch, Pierce, Fenner & Smith, 693 F.2d 1023, 1027-28 (1983). The Ninth Circuit never bothered to consider in the second arbitration whether the dispute even came within or outside of the arbitration clause.

At one time, in 1981, the Ninth Circuit

agreed that these procedural issues were for the arbitrator, and not the courts, to decide; Wren v. Sletten Const. Co., 654 F.2d 529 (1981). See also ASTA of California, Inc. v. Continental Ins. Co., 702 F.2d 172, 175 (9th Cir. 1983) amended 754 F.2d 1394. But it now disagrees.

It would appear that the Ninth Circuit is returning to the procedures and reasoning that this court rejected in Dean Witter Reynolds Inc. v. Byrd, 470 US 213, 84 L.Ed.2d 158, 105 S.Ct. 1238 (1985). In that case the Ninth Circuit refused to compel arbitration to avoid bifurcated proceedings and perhaps redundant efforts to litigate the same factual question twice. At the same time, the Sixth, Seventh, and Eighth Circuits had held that the Federal Arbitration Act divested the district courts of any discretion in arbitration cases that contained both arbitrable and non-arbitrable claims, and instead required those courts to compel arbitration when asked to do so. This, those circuits reasoned, was required by the strong federal policy that requires courts to enforce "the bargain of parties to arbitrate and "not substitute (their) own views of economy and efficiency" for those of Congress. Dickinson v. Heinold Securities, Inc. 661 F.2d 638, 646 (CA7 1981).

This court was persuaded by the Sixth, Seventh and Eighth Circuits and responded to the Ninth Circuit (Byrd, 470 US @217, 84 L.E..2d @163):

> "We agree with these latter courts that the Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the

result would be the possibility of inefficient maintenance of separate proceedings in different forums....

The Arbitration Act provides that written agreements to arbitrate controversies arising out of an existing contract `shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.' 9 USC §2. By its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed. §§3, 4. Thus, insofar as the language of the Act guides our disposition of this case, we would conclude that

> agreements to arbitrate must be enforced, absent a ground for revocation of the contractual agreement."

No one in this case ever even alleged any ground for revocation of the contractual agreement to arbitrate. This court further stated (Byrd, 470 US @221, 84 L.Ed.2d 158):

> "The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is `piecemeal' litigation, at least absent a countervailing policy manifested in another federal statute."

No countervailing policy of any federal statute was ever cited by the Respondent or any of the lower courts to support denial of Active's request for arbitration.

In the Byrd case, this court refused to determine what preclusive effect, if any, an arbitration proceeding would have on a federal court proceeding but found that such argument would not support the denial of a request for arbitration. It noted that the arbitration proceeding was a non-judicial proceeding and would not fall under the full faith and credit clause. This court has held that the full faith and credit statute, 28 USC §1738, that applies to State judicial proceedings, does not apply to arbitration awards, McConald v. West Branch, 446 US 284, 287-88, 80 L.Ed.2d 302, 104 S.Ct. 1799 (1984).

Under these circumstances, it would seem inappropriate, especially in this case, for the Ninth Circuit to conclude that the State Court fraud action judgment would have had preclusive effect on the arbitration of the RICO claims, even if the Ninth Circuit and lower courts did have that ability to rule on the subject.

Curiously, in the first Ninth Circuit court case, the Ninth Circuit ruled that Alaska law must be applied to the disputes between Active and Hoffman, _Sparling v. Hoffman Construction Co., Inc._, 864 F.2d 635, 641. Yet the Ninth Circuit would not even consider Alaska's own case law on the subject of referral to arbitration, _University of Alaska v. Modern Construction, Inc._, 522 P.2d 1132, 1140 (Alaska 1974):

> "Finally, the University claims that the arbitrators exceeded their powers by ignoring legal precedent . . . . The general rule in both statutory and common law is that

> arbitrators need not follow otherwise applicable law when deciding issues properly before them, unless they are commanded to do so by the terms of the arbitration agreement. Since the relevant clause here contains no such command, the arbitrators were free to determine the merits of Modern's claims under their own notions of fairness."

The arbitration clause in this case also has no such command. See addendum page lxxiv item (d). Furthermore, arbitrator's notions a fairness may be a long way from any court's technical, legalistic, notions of preclusive effects of various types of actions.

2. MAY GOOD FAITH, INADVERTENT AND INNOCENT PROCEDURAL MISSTEPS IN NEW OR UNDECIDED AREAS OF LAW BE UTILIZED IN

FEDERAL COURTS

TO DENY HEARING ON THE MERITS?

The record clearly indicates that the majority of the panel in the Ninth Circuit was wrong when it concluded that (8186) "it cannot be said that Active lacked knowledge of the right to compel arbitration." and, because Alaska state courts are within the geographic area of this circuit, that:

> "Notably, Active faced no precedential barrier in this circuit to arbitration of its RICO claim prior to the Supreme Court's decision in Shearson."

The Petitioner knew it could not arbitrate the RICO case from February 22, 1985 until March 10, 1988. The Ninth Circuit even supported that position in December 1988 when it would not reverse the district court and order the matter stayed pending arbitration, as requested by Active.

The majority also contended that because of that court's decision in Lou v. Belzberg, 834 F.2d 730 (9th Cir. 1987), cert. denied, 485 U.S. 993, 99 L.Ed.2d 512, 108 S.Ct. 1302 (1988), Active was required to immediately seek to amend its claims before final judgment and present its RICO claims in the state court action. That could only be considered a reasonable request by a considerable stretch of imaginative hindsight.

The Lou v. Belzberg, opinion was not filed until November 12, 1987 and the certiorari was not dismissed until April 4, 1988, several weeks after final judgement in the state court action of March 10, 1988. The state court multiple party case had been fully tried from July 6 through August 13, 1987. None of the other parties except Hoffman were involved in the RICO claim.

The state court was, on November 12th, considering voluminous findings of fact presented by all parties. The state court findings were entered on December 3, 1987. On November 12, 1987 the U.S. District Court finally ruled and dismissed the earlier RICO case and denied Petitioner's request for a stay pending arbitration. Petitioner was moving to reconsider that dismissal.

Even if Petitioner somehow had an on-line computer to pick up the Lou v. Belzberg, case (on an unrelated issue to the demands that were immediately before the parties) it is totally unfair to presume that Petitioner had a duty to move the Alaska Superior Court to reopen its proceedings, especially in the light of all of the past activity of Hoffman.

There was and is ample Alaska authority for denying any motion to amend, now required by Ninth Circuit hindsight, because of prejudice to other parties in the added discovery and additional burdensome trial of key RICO issues; Rutledge v. Alyeska Pipeline Service Co., 727 P.2d 1050 (Alaska 1986). See also Koehring Mfg. v. Earthmovers of Fairbanks, 763 P.2d 499, 504-509 (Alaska 1988); Shooshanian v. Wagner, 672 P.2d 455 (Alaska 1983); and Stanton v. Fuchs, 660 P.2d 1197 n.2 (Alaska, 1983).

Judge Reinhardt observes, Petitioner had always withheld the RICO claims from the state court action without any objection by Hoffman. Petitioner does not believe that either Hoffman or any court should now object because Petitioner did not seek to amend its state court action after trial, and did not seek to impose on the state court's discretion to devote even more time to a case that had already consumed about 10% of its time for the year 1987.

There was certainly no authority in the State of Alaska for the Petitioner to require the Superior Court, at that late date, to hear its additional RICO evidence and arguments. Certainly other parties to the suit, wishing to save further expenses, attorney fees and time, would have opposed it.

3. HOFFMAN NEVER PREJUDICED BY ARBITRATION

Arbitration was never any prejudice to Hoffman. The Ninth Circuit seemed to be impressed by the size of the award in the state court action. Well over half of that award was eaten up in expenses and legal fees, much of which was not covered by the award and would be part of the additional RICO damages to be considered by fair arbitrators, not the legal rules on allowable costs that could be imposed by the courts.

It was improper for the Ninth Circuit, or the district court before it, to even consider the "size" of the Petitioner's prior judgment without knowing anything about the losses or the facts. Casual references as to size of the judgment may be impressive, but we respectfully submit they have no relevancy to the matters in this federal court case and were merely utilized to prejudice the claims of the Petitioner. The lower courts should have never even referred to the "size" of Petitioner's award in state court unless those courts were ready to examine the fairness and adequacy of those awards in detail, a decision the Ninth Circuit had already made not to do in Sparling v.

Hoffman Construction Co., 864 F.2d 635 (9th Cir. 1988).

The reason there can be no prejudice to Hoffman was that its own printed form contract provided bifurcation of arbitration and litigation. It sought bifurcation of arbitration and litigation. It acquiesced to Active's continuing bifurcation of claims. As to delay, that has mostly been spent in being enjoined from arbitration, and in awaiting decisions of various tribunals at the trial and appeal levels. It certainly cannot be laid to the feet of the Petitioner which suffered grievously because of it.

4. DELAYS WERE NOT THE PETITIONER'S FAULT

With due respect for the majority in the Ninth Circuit, the Petitioner never has had an opportunity to resolve its RICO claims on the merits and the delays that have accompanied its inability to resolve those claims on the merits are not of its own making. The delays could be laid at the feet of the Respondent, Hoffman, which sought the injunction in the first place, which acquiesced to keeping the RICO claims in the federal court and yet, which supported the dismissal of those claims in federal court, rather than their arbitration on the grounds that they should be arbitrated, rather than on the grounds that they should have been tried in the state court. Hoffman undoubtedly believed at that time, despite Lou v. Belzberg, 834 F.2d 730, 735-39, that it did not have strong grounds to argue that the Appellant should have moved to reopen the evidentiary phase of the state court action and have tried its RICO case in state court. Hoffman's fine attorneys felt that it did not then have a good case on preclusion.

5. COURTS SHOULD REJECT THE PROCEDURAL SKILL (SHILL?) GAME WHERE ONE MISSTEP DENIES THE LOOSER A HEARING ON THE MERITS.

Procedural moves during litigation should not be allowed to be the modern substitute for technical rules of pleading and become "the game of skill where one misstep by counsel may be decisive to the outcome." Judge Reinhardt (8192) leads us all to the correct rule from Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 373, 16 L.Ed.2d 169, 86 S.Ct. 1079 (1966):

> "If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits."

We agree with Judge Reinhardt when he

says (8188):

> "I believe the majority opinion fails to take into account the difficulties involved in a party's decision whether to arbitrate or abjudicate a claim. Some claims are arbitrable, others are not. The law is frequently abstruse and may change during the course of the proceedings, as happened in this case. The majority's disposition places all the risk resulting from this legal uncertainty on the plaintiff, the person possessing legitimate claims. It imposes the ultimate penalty, that of forfeiture, on the plaintiffs who guess `wrong'. This approach does a disservice to plaintiffs generally and is inconsistent with the ultimate purpose of dispute

resolution - to resolve disputes on the merits.

Judge Reinhardt cites Conley v. Gibson, 355 U.S. 41, 48, 2 L.Ed.2d 80, 78 S.Ct. 99 (1957), which is cited repeatedly by courts today in support of liberal rules of pleading. That case clearly states that federal pleading in not a game of skill. Judge Reinhardt would apply that universally adopted reasoning by analogy to the labyrinth of procedure. We support that worthy cause and adopt it here as one of the prime reasons for our request for consideration of this petition for a writ of certiorari.

CONCLUSION

Our case offers one of those ripe moments for this court to address two matters of fundamental and primary concern to the bench, bar and others involved in disputes resolutions. This court is being asked to address the procedural scope of arbitration and to fundamentally guide the use of procedure within the federal courts to assure all parties that not only will their arbitration clauses be fully enforced, but that procedure shall not continue to be used as a skill game where one possible misstep will deny a hearing of controversies upon their merits.

November 11, 1992

Respectfully submitted

Edward Dickson Campbell,
Petitioner's Attorney

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HOFFMAN CONSTRUCTION)
COMPANY OF OREGON, an)
Corporation,)
Plaintiff-Appellee,) No. 90-35523
v.)
) OPINION
ACTIVE ERECTORS AND)
INSTALLERS, INC., a)
Washington Corporation)
Defendant, Appellant.)

ARGUED AUGUST 22, 1991

FILED JULY 8, 1992

Before: Thomas Tang, Stephen Reinhardt and Pamela Ann Rymer, Circuit Judges

Opinion by Judge Rymer;

Dissent by Judge Reinhardt

OPINION, Rymer, Circuit Judge:

After receiving a favorable judgment against Hoffman Construction Company in Alaska state court, Active Erectors and

Installers, Inc. filed a demand for arbitration on its RICO claim against Hoffman, a claim which Active had not litigated in state court. Hoffman then brought this suit for declaratory and injunctive relief in order to forestall such an arbitration. The district court granted a permanent injunction in Hoffman's favor. The court reasoned that Active waived its right to arbitrate its RICO claim when it opted to proceed in state court, and that the state court action, under the doctrine of res judicata, barred any subsequent attempt to arbitrate that claim.

On appeal, Active contends that its decision to proceed in state court on certain of its claims does not constitute a waiver of its right to seek a subsequent arbitration of its RICO claim. We believe, however,that the district court correctly found that Active's waiver of arbitration in favor of an Alaskan state court proceeding included a waiver of the right to arbitrate a potential RICO claim. That state court action therefore bars a subsequent RICO arbitration based on the same set of facts because of res judicata. Accordingly, we affirm.

I

In October 1983, Hoffman and the Kenai Peninsula Borough entered into a contract for the construction of a high school in Homer, alaska. Hoffman then subcontracted the structural steel work to Active. The contract between Hoffman and Active provided that disputes between them that did not involve the conduct of the property owner had to be arbitrated unless they agreed otherwise.

A dispute subsequently arose among the Borough, Hoffman, and Active concerning cost overruns. In December 1984, active sued Hoffman in Federal court asserting, among others, a RICO claim. In February 1985, Active demanded arbitration against Hoffman. On April 15 of that year, Active wrote a letter to Hoffman asserting that Active was prepared to "bring[] *all* of the monetary claims of Active against Hoffman" arising our of the construction project in Alaska state court. (Emphasis added). The letter, however, also stated that the RICO claim, along with two other claims, would remain in federal court. Active further informed Hoffman that it would dismiss its arbitration demand as soon as Hoffman assured Active that it would not change its position "that all claims against it may be tried [in state court]."

In May 1985, the district court dismissed the federal suit on the ground that the claims should have gone to arbitration instead of to federal court. We subsequently affirmed the dismissal in *Sparling v. Hoffman Construction* Co., 864 F.2d 635 (9th Cir. 1988).

In December 1985, Active brought its Alaska state suit without any RICO claim. Thus, as of the time the state suit was initiated, the federal district court had dismissed the RICO claim (along with all other claims), and no RICO claim had been asserted in any state court proceeding. Then, when Hoffman responded to the state suit and did not raise the issue of arbitration, Active, in March 1986, withdrew its arbitration request. The state court case was tried in July and August of 1987, and in March 1988 the Superior Court entered judgment in favor of Active.

We issued our opinion in Sparling in December, 1988. We affirmed the district court on the ground that Active had agreed to submit its claims to arbitration. In January 1989, shortly after this opinion was issued, Active filed a new demand for arbitration of its RICO claim. Hoffman brought this suit in federal district court seeking declaratory and injunctive relief to prevent such an arbitration from proceeding. The district court ruled in favor of Hoffman. the court held that the RICO claim had always been arbitrable under the agreement, and that by proceeding in state court without a RICO claim, having waived arbitration to get into state court, Active was precluded from adjudicating the RICO claim in a new arbitration.

[1] Hoffman argues that Active waived its right to compel arbitration. "A party seeking to prove waiver of a right to arbitration must demonstrate: (1)

knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts." Fisher v. A.G. Becker Paribas, Inc., 791 F.2d 691, 694 (9th Cir. 1986). We agree with the district court that Hoffman satisfactorily demonstrated the existence of all three prongs.

[2] First, it cannot be said that Active lacked knowledge of the right to compel arbitration. The contract itself called for arbitration of disputes between Active and Hoffman. Additionally, the district court, prior to initiation of the state action, dismissed the federal suit on the ground that the claim should have gone to arbitration. Thus, both the contract and the federal court informed Active of the arbitrability of its claim.

The fact that the Supreme Court did not definitively address the arbitrability of RICO claims until 1987 does not vitiate the conclusion that Active was aware that its claims were arbitrable. ***See Shearson/American Express Inc. v. McMahon,*** 482 U.S. 220, 238-42 (1987). Notably, Active faced no precedential barrier in this circuit to arbitration of its RICO claim prior to the Supreme Court's decision in ***Shearson***.

[3] As to the second prong of the waiver test, the district court properly concluded that Active acted in a manner inconsistent with its right to arbitration. Active withdrew its request to arbitrate in light of Hoffman's waiver of arbitrability, and that waiver extended to "***any*** of the disputes between it and Active Erectors." (Emphasis added). Thus, Active waived arbitration of ***all*** its

claims against Hoffman, including its RICO claim. Active then sued in state court, an act that undeniably is inconsistent with enforcing its arbitration right. Furthermore, at the time Active initiated its state court suit, it had already been told by the district court that all of its claims were arbitrable, and yet it still opted for a route - state court litigation - that was inconsistent with that arbitration.

[4] Active contends that it did not waive its right to arbitration when it initiated the Alaska state court suit because it did not believe that it could bring a RICO claim in state court. This argument is unavailing because we decided in ***Lou v. Belzberg,*** 834 F.2d 730, 735-39 (9th Cir. 1987), ***cert. denied,*** 485 U.S. 993 (1988), permitting such jurisdiction, before final judgment was entered in the

state action. Active, therefore, could have sough permission from the state court to amend its pleadings to include a RICO claim. Because the holding in ***Lou*** gave active the right to assert its RICO claim in state court, it had no excuse not to do so, given that the RICO claim undisputedly arose out of the same course of conduct as the other state claims.

Nor does the decision in ***Sparling***, 864 F.2d 635, support Active's contention. In ***Sparling***, we held that Hoffman had not waived arbitrability in favor of a federal court case. ***Id***. at 639 ('Hoffman only waived the arbitration clause in favor of ongoing state court proceedings, not the federal action."). Thus, ***Sparling*** simply stands for the proposition that, if the choice were between arbitration and a ***federal*** court case as to ***any*** claims (including RICO), Active had to arbitrate those claims because Hoffman never waived its right to arbitration in favor of a federal case.

[5] Active, foreclosed from federal court, still could reach an agreement with Hoffman, as it actually did, that any of its claims could be brought in state court. Pursuant to that agreement, Hoffman waived arbitration for all claims, including RICO, in favor of the state court arbitration, but retained its position that it would demand arbitration over federal litigation. As a result, the only court in which Active could bring *any* of its claims was state court, and by choosing to sue in state court, it waived its right to arbitration.

[6] Finally, prejudice to Hoffman is apparent. As the district court stated, "[t]he prejudice is staleness of the claim, and more importantly, the

subjection of Hoffman to the litigation process in State Court, the discovery process, the expense of litigation, and the judgment for $679.434.76."

III

[7] Having waived arbitration in favor of the Alaska state court proceeding, res judicata now bars a RICO arbitration based on the same set of facts. Active received a judgment against Hoffman in state court. "It is now settled that a federal court must give a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." ***Migra v. Warren city School dist. Bd. of Educ.,*** 465 U.S. 75, 81 (1984). In Alaska, res judicata would bar Active's RICO claim because res judicata covers "relevant claims that ***could*** have been raised" in the prior case, but were not. ***DeNardo v.***

State, 740 P.2d 453, 456 (Alaska) (emphasis added), ***cert. denied and appeal dismissed,*** 484 U.S. 919 (1987). A mere change in the legal theory asserted cannot revive an already barred action. ***Id.*** Because the RICO claim arose out of the same course of events already litigated in the Alaska state court, Active may not arbitrate that claim now.

AFFIRMED.

REINHARDT, Circuit Judge, dissenting:

I respectfully dissent from the decision of the majority. I believe that the threshold question in this case is whether Active was justified in pursuing its effort to obtain a judicial determination of its RICO claim in early 1985; because it was, it should not be penalized for having done so. Moreover, Active did not subsequently forfeit its right to pursue its RICO claim separately, if only for the reason that it specifically reserved that right when it filed its state court action.

That the threshold determination must be whether Active was justified in keeping its RICO claim separate when it originally demanded arbitration in early 1985 can be seen by examining section III of the majority opinion. The opinion is dependent upon the proposition that the preclusive effect of a judgment includes any claim that could have been raised in that proceeding; here, according to the majority that includes the RICO claim that Active split-off prior to the time the state court action was filed. ***See generally*** Restatement (Second) of Judgment § 26.[1] If a claim falls within one of those exceptions and has been properly split-off, it is, of course, not precluded by virtue of a plaintiff's failure to raise it in the principal action. Here, there are two exceptions that are applicable and that bar preclusion in this case: first, a plaintiff may split his claim when the defendant acquiesces in such a split; second, a plaintiff may do so when jurisdictional barriers justify the split. *See id.* §§ 26 (a) & (c). Although Active's actions satisfy both of these

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[1]. Although the Restatement is not law, both the Alaska Supreme Court and our circuit have cited its split claim

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provisions with approval, ***see e.g., State v. Smith,*** 720 P.2d 40, 41 (1986); ***Clark v. Bear Stearns & Co.,*** No. 91-55263, slip. op. at 6539 (9th Cir.June 12, 1992), and there appears to be no authority to suggest that the Alaska courts would decline to follow its provisions.

exceptions the majority never discusses either of them.

Active first split its claim in February, 1985, when it filed an arbitration demand that did not contain its RICO claim while continuing to pursue its RICO action in federal court. Active's decision to split its claim appears to have been justified on jurisdictional grounds. Although by June 8, 1987, it was established that RICO claims were arbitrable, ***see Shearson v. McMahon,*** 482 U.s. 220 (1987), in February of 1985 a reasonable litigant would likely have believed that the contrary was true. The leading case on the issue, ***S.A. Minercao da Trindade-Samitri v. Utah Int'l, Inc.,*** 576 F.supp. 566, ***amended,*** 579 F.Supp. 1049 (S.D.N.Y. 1983), which held that RICO claims were not arbitrable, had already been affirmed by the court of appeals, ***see*** 745 F.2d 190, 196 (2nd cir. 1984). A number of other courts agreed. ***See, e.g., Witt v. Merril Lynch, Inc.***, 602 F.Supp. 867, 870 (w.D.Pa. 1985); ***Universal Marine Ins. Co. v. Beacon Ins. Co.***, 588 F.supp 735, 738 (W.D.N.C. 1984); ***Wilcox v. Ho-Wing Sit,*** 586 F.supp. 561, 567 (N.D.Cal. 1984). There does not appear to have been any contrary authority at that time. Thus, in 1985 Active was certainly justified in believing that its RICO claim was not arbitrable.

There are other factors which support Active's right to split its claims in light of the reasonableness of its belief that RICO claims were not arbitrable. First, the specific question facing Active was whether to bring its RICO claim in court or in arbitration. It may be that a litigant cannot rely on uncertainty in the law when choosing to split its claim between state and federal court. In such a case, the law generally assumes that state and federal courts are equally competent so that a litigant cannot justify dividing its claims between the two -- it must pick one and seek definitive resolution of the jurisdictional issue in that court. ***See*** Restatement § 86 comment b. By contrast, we generally do ***not*** assume that courts and arbitral proceedings are equally competent; to the contrary, the law assumes that legal disputes are ordinarily resolved by the courts unless the parties have agreed to arbitrate them. For this reason, the issue of arbitrability is for the courts, not the arbitrator, to decide. ***See AT&T v. Communications Workers of America,*** 474 U.S. 643, 647 (1986); ***United Steelworkers of America v. Warrior & Gulf Navigation Co.***, 363 U.S. 574, 582 (1960).

When a party justifiably believes that it has a right to pursue a claim in a judicial rather than an arbitral proceeding, it must be free to test the validity of that belief.

Second, the nexus of contracts underlying the disputes between Hoffman and Active recognizes that a litigant will split his claim. As both parties recognize, the arbitration clauses in those contracts require arbitration of only ***some*** claims. Thus, in drafting the contracts, the parties must have assumed that claims would be divided between arbitration and court proceedings. Accordingly, the burden placed on Hoffman by Active's pursuit of claims against it in two different fora should be given little if any weight.

As noted earlier, Active's splitting of its claims also falls under the other exception to the general anti-claim splitting rule. Hoffman acquiesced in Active's decision to try the RICO claim separately. When Hoffman and Active reached an agreement to consolidate all the claims in the Alaska state court action, Active expressly reserved the RICO claim from the agreement, stating that that claim "w[ould] remain in federal court." Hoffman did not object to this reservation when the other claims were consolidated in state court. It should hardly be allowed to do so now.

For the above reasons, I believe that the general rule against claim splitting relied on by the majority is simply inapplicable. Active was justified in seeking a judicial resolution of its RICO claim in the federal courts. Its attempt to do so did not serve to waive its right to arbitrate in the event the federal court found that arbitration rather than litigation was the required procedure. The right to pursue a justified belief in the justiciability of a claim presupposes the ability to arbitrate if the court determines that the claim is subject to an arbitration provision. That is what happened here -- Active pursue a justified belief in the justiciability of its RICO claim but, after a change in the law, the court determined that the claim was subject to arbitration. Moreover, Hoffman never objected to, and in fact acquiesced in, Active's preservation of its right to pursue its RICO claim separately, and to withhold that claim from the state court action. In view of the above, there is simply no basis for the majority's conclusion that Active waive its right to arbitrate the RICO claim or that it was prohibited from splitting that claim off from the remainder of the proceedings. Accordingly, the state court judgment is not res judicata as to the claim that Active deliberately and expressly withheld without objection from Hoffman at the time it filed the state court action.

Aside from the above, I have another fundamental disagreement with the majority's approach. I believe that the majority opinion fails to take into account the difficulties involved in a party's decision whether to arbitrate or adjudicate a claim. Some claims are arbitrable, others are not. the law is frequently abstruse and may change during the course of the proceedings, as happened in this case. The majority's disposition places all the risk resulting from this legal uncertainty on the plaintiff, the person possessing legitimate claims. It imposes the ultimate penalty, that of forfeiture, on plaintiffs who guess "wrong". This approach does a disservice to plaintiffs generally and is inconsistent with the ultimate purpose of dispute resolution -- to resolve disputes on the merits. *Ct. Surrowitz v. Hilton Hotels Corp.,* 383 U.S. 363, 373 (1966) ("If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits."); ***Conley v. Gibson*** 355 U.S. 41, 48 (1957) ("Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome.") Accordingly, I am compelled to dissent.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

HOFFMAN CONSTRUCTION COMPANY OF OREGON, an Oregon Corporation, Plaintiff, v. ACTIVE ERECTORS & INSTALLERS, INC., a Washington Corp. Defendant	No. CV-89-0072-AJK ORDER AND PRELIMINARY INJUNCTION

The motion of plaintiff Hoffman Construction Company of Oregon ("Hoffman") for a preliminary injunction having been heard before the Court; and it appearing to the satisfaction of the Court that due and proper notice of the hearing of said motion was given; and the Court, having read the documents and papers on file, having heard arguments and being fully advised, finds that Defendant Active

Erectors & Installers, Inc. ("Active Erectors") should be enjoined from asserting against Hoffman in arbitration a claim under the Federal RICO Statute, 18 U.S.C. § 1961 et seq.

It is hereby ORDERED, ADJUDGED and DECREED that Active Erectors & Installers, Inc. be enjoined from asserting a Federal RICO claim against Hoffman in arbitration.

Entered at Anchorage, Alaska this 7th day of November, 1989.

Andrew J. Kleinfeld
United States District Judge

Presented by
W. D. Bennett, Esq.
1029 West Third Avenue, Suite 300
Anchorage, AK 99501
(907) 279 8561
Attorneys for Plaintiff Hoffman
Construction Company of Oregon

FILED 11-8-89

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

HOFFMAN CONSTRUCTION COMPANY OF OREGON, Plaintiff,	No. A-89-0072-Civil
	Anchorage, AK
v.	Tuesday
ACTIVE ERECTORS & INSTALLERS, INC., Defendant	November 7, 1989 2:20 p.m.

Plaintiff's motion of Preliminary Injunction

Defendant's Motion to Compel Arbitration or

Stay Proceedings

TRANSCRIPT OF PROCEEDING:

BEFORE THE HONORABLE ANDREW J. KLEINFELD

UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Plaintiff: Richard S. Twiss, Esq., of Perkins Coie, 1201 3rd Ave, 40th Floor, Seattle, WA 98101 (206) 583 8888 and Michael E. Kreger, Esq., of Perkins Coie, 1029 W. 3rd Ave, Ste. 300, Anchorage, AK 99501 (907) 279 8561.

For Defendant: Edward D. Campbell, Esq., 2630 N.W. 62nd St., Seattle, WA 98107 (206) 783 3410 and David Pease, Esq. of Biss & Holmes, 701 Christensen Dr., Anchorage, AK 99501 (907) 277 8564.

THE COURT: Thank you Mr. Twiss. I'll rule at this time.

Hoffman's motion for preliminary injunction at Docket No. 7 is granted. Active's motion to compel arbitration or stay proceedings pending arbitration Docket No. 11, is denied. Here are the reasons why.

First of all, I found the arguments made by Hoffman in its briefs, and oral argument, in large part persuasive. In addition, my reason are plain in part from the colloquy with counsel during the arguments today.

The contract in this case provided for two classes of disputes. There was a nonarbitrable class of disputes that arose from conduct of the owner, Kenai Peninsula Borough. There was an arbitrable class of disputes, that arose out of the conduct of Hoffman, the general. The RICO claim was one arising out of the conduct of Hoffman, so it was an arbitrable claim.

Arbitrability was governed by a requirement in the contract that a demand for arbitration be filed within 30 days of decision. Now, in the absence of a document in the record, plainly purporting and appearing to be such a decision, it is difficult to say exactly when the 30 days started.

However, there is no question but that a demand for arbitration was made and accepted as timely. The demand for arbitration included a claim for fraud by

Hoffman. That is a claim in the same class, although distinct from a RICO claim.

There was no barrier whatsoever, to the assertion by Active of a RICO claim in that arbitration demand. That was the arbitration demand made in 1985. In Sparling vs. Hoffman, 864 F.2d 635, an appeal from previous action by this Court and affirmance. The Appellate Court noted the arbitrability of the RICO claim. It takes too much of a --it infers too much from the Ninth Circuit decision, to take that to mean a command to arbitrate or a direction to begin the process of demanding arbitration on the RICO claim.

The Ninth Circuit Court of Appeals, found that the RICO claim was arbitrable in the context of deciding that the trail Judge's dismissal of Active's claims, was correct. The only significance of arbitrability to the Court of Appeals, was to determine whether it was proper for the District Court to dismiss RICO claims in District Court.

Now, Hoffman for a very substantial period of time, formerly consented to waive arbitrability and allow litigation of the arbitrable RICO claim, all arbitrable claims, which would include the RICO claim, in the State Superior Court in Kenai. That waiver is noted among other places at page 639 of the Court of Appeal's opinion, column one. And it was also noted in the portion of the transcript discussed in the colloquy this afternoon.

Because of that waiver, the RICO claim was litigable in State Court as well as Federal Court. Thus there were two forums in both of which Active asserted claims, and in both of which, the RICO claim was fully, and entirely, and without restriction, litigable. In one of those forums, arbitration Hoffman -- of Active rather withdrew its claims. In the other forum, the State Superior Court, Active pursued its claims to judgment and was extremely successful. The RICO claim, because it was capable of being litigated, was plainly merged in the judgment.

Now, the analysis I've given, really goes only to one element of what is before the Court today, and that is probability of success on the merits. On the motion for preliminary injunction, the likelihood of plaintiff's success on the merits is one consideration. I think the likelihood of Hoffman's success on the merits is quite high.

The second element in the traditional four part test, is the threat of irreparable harm to Hoffman if the injunction is not imposed. the threat is obviously great. It would include discovery, which has been recognized as a threat of irreparable harm in similar cases. It would include litigation expenses. It would also include the possibility of an arbitration award, since arbiters are not entirely bound by principles of law. And it would in all likelihood include harm to the credit of Hoffman during the pendency of proceedings.

Balance of this harm to Hoffman, against the harm to Active, if the injunction is imposed at this point there is no barrier to Active collecting its judgment of more than half million dollars as I recall. And I cannot see any very substantial harm to Active. The public interest element, the fourth element, does not play a part in this entirely private dispute.

Under Alaska law, which would apply to res judicata, the mere change in legal theory from breach of contract and fraud to RICO, would not prevent res judicata under Pankratz 652 P.2d at 74 and Tolstrup v. Miller, 726 P.2d 1304.

The contention that Hoffman (sic) makes that it was unable to bring the RICO claim in State Court, is erroneous. Lou v. Belzberg, 834 F.2d 730, holds that the RICO claim could have been asserted in State Court. That decision came down in 1987. Federal Rule of Civil Procedure 15 and Alaska Rule of Civil Procedure15 are similar. In allowing amendments to pleadings, even after presentation of evidence. So, if Active sought to bring the RICO claim, and was concerned about the state of the law before Lou v. Belzberg, they still had plenty of time to add it between Lou v. Belzberg and judgment.

The case is fairly analogous to Miller v. Fort Worth Distributing, 781 F.2d 494. That case is closely in point. It's a Fifth Circuit case, but I don't see anything in Ninth Circuit law that would be different in any important way.

(Pause)

Some of the frustration expressed by the court in Miller, is also applicable to this case. We just keep seeing the same case over and over again, even when its been fully litigated and resolved on the merits in one forum after another. This decision is not from any hostility to arbitration, but rather a hostility to repeated arbitration and repeated litigation.

It may be that Active made a very wise decision not to assert its RICO claim. It may be that Active would have appeared greedy to the jury, and hurt its chances of getting the very favorable result that it did on its compensatory damages claim, had it asserted the RICO claim. It may be that the additional complexity, would have raised the risk of error by the court or the jury as complexity often does. It may be that the additional complexity would have delayed trial, so that it -- instead of getting its $600,000 judgment in January '88, Active would have been waiting another two or three or four years. It may be that not asserting the RICO claim prevented a removal to Federal Court, where procedural or substantive rules would have been less receptive to its claims. There are a lot of possibilities. It may have been very wise for Active to frame the claim as it did. But it made its choice.

The footnote that was cited by Hoffman in Miller is applicable. the Miller case also deals with the prejudice to a party which has litigated after waiving its right to arbitrability, and that also applies here. The Miller case notes, that the expense of and burden of numerous depositions and other discovery allowed in litigation but not in arbitration, is a prejudice to be taken account of.

In the case at bar, the litigation, was -- went not only through discovery, but also to judgment. There was never a Ninth Circuit decision that said, State Courts could not hear RICO claims, nor has any Alaska Supreme Court decision to that effect been brought to this Court's attention.

(Pause)

There was no barrier to arbitration on account of the State Superior Court order.

The State Superior Court injunction at a- - I believe it's at Exhibit C to Hoffman's motion for preliminary injunction says, that any claims Active may have, "which are on account of acts or omissions of Kenai Peninsula Borough or its representatives, may not be submitted by Active Erectors to arbitration." All that did was draw the distinction that the contracts draw between arbitrable and non-arbitrable claims. And it said, that the arbitrable ones -- the nonarbitrable claims cannot be submitted to arbitration.

This was not in the class of nonarbitrable claims. This was not a claim on account of acts or omissions of Kenai Peninsula Borough. this RICO claim was on account of acts or omissions of Hoffman, not Kenai Peninsula Borough, so it was unaffected by the Superior Court injunction. And the Superior Court injunction was no barrier to arbitrating it.

What's more, subsequent to that injunction, Hoffman waived the benefit of the injunction, waived the protection of the injunction, and consented to arbitration of the nonarbitrable claims. The January 12, 1989, demand for arbitration, Exhibit 5, it's Docket No. 11, says that Hoffman devised a fraudulent scheme, and used the mails to bring about the fraud in 1983 and 1984. Its exactly the kind of claim that should have been brought either in the prior arbitration or the prior state litigation.

(Pause)

In this case, the question is not really as it often is in arbitration disputes, whether the agreement provided for arbitration. There is no issue as to that. Hoffman agrees that the RICO claim was arbitrable. That is that the agreement did provide for arbitration. the problem is really procedural.

The agreement provided for arbitration, there was an arbitration demand. there was a consent to litigate the arbitrable claims. They were litigated. they resulted in a judgment of $679,434.76. The claim has been arbitrated or withdrawn from arbitration, and litigated, and its gone to a conclusion.

(Pause)

I don't think it's necessary to find a modification to the contract, although the matter could be analyzed in that way. I'm more comfortable in this case with a waiver analysis. the standards for waiver are high, but they're met in this case. The Fischer case at 791 F.2d 694 requires a party seeking to prove waiver to demonstrate, number one, knowledge of an existing right to compel arbitration. Number two, acts inconsistent with that existing right, and number three, prejudice to the party opposing arbitration resulting from the inconsistent acts. Everyone of those three elements is plainly present here.

Hoffman's knowledge or arbitrability was plain from the contract itself. there is nothing obscure about the construction contract and subcontract here. If somehow they had missed it, the Ninth Circuit told them in the plainest English, that the claim was arbitrable, and told them that before they finished their State Court litigation.

Number two, acts inconsistent with the right to arbitration, there's no question that there were acts inconsistent. the first inconsistent act was -- well I don't mean the first in time, but there were two inconsistent acts. One was withdrawing the arbitration, and the other was litigating all claims against Hoffman in State Court.

Number three, prejudice resulting from the inconsistent acts. the prejudice is staleness of the claim, and more importantly, the subjection of Hoffman to the litigation process in State Court, the discovery process, the expense of litigation, and the judgment for $679,434.76. Six hundred seventy-nine thousand dollars is prejudicial, and so is what is probably the six figure lawyer's bill, as well as the revelation of all corporate records, that probably lead up to that judgment.

(Pause)

That concludes the reasons for the decision. My guess is, but I want to ask you both about this, my guess is that both sides would just as soon have this turn into a final judgment, instead of a preliminary, and a judgment on Hoffman's side so that they can be done with the lawsuit, and on Active's side so that they and appeal if they think this is appealable. Is that correct?

MR. TWISS: That's certainly correct from our perspective, Your Honor.

THE COURT: What about from Active's? Mr. Campbell. I'm not --

MR CAMPBELL: I may not -- we might not oppose a motion for the -- for a judgment on it. I don't know that I am in a position to make a decision on that particular point.

THE COURT: All right. I'm not going to force you to an election on that now.

MR CAMPBELL: Thank you.

THE COURT: And I don't want to impose any waiver of important rights, so I'll just invite a motion. Do you want a time limit or -- I suppose it's in you interest to get it done. You probably don't need one.

MR. TWISS: I think it's in everyone's interest to get it done, Your Honor. We will so move at this time, we'll give you something in --

THE COURT: You'll have to do it in writing so it gets docketed.

MR. TWISS: Yeah, we will give you something in writing, and on the time limit its not my intention to cut Mr. Campbell off at the ankles in terms of his ability to respond. So my suggestion perhaps is that he and I can confer on that to see if we can do it sooner rather than later. Otherwise we can simply bring it on for hearing in accordance with the normal rules.

THE COURT: That's fine. I'll sign

some orders now. I think we've been through the matter enough, so you may not need oral argument.

MR. TWISS: If I may, Your Honor. Perhaps if we simply file the papers which will be done in the next day or so, then we're not going to ask for an oral argument, and that ought to get the ball rolling on getting the other side to where they can make a decision.

THE COURT: That's fine, thanks.

(Pause)

THE COURT: I've signed the form of order in preliminary injunction, which was lodged by Hoffman. We'll recess. Thank you counsel.

COUNSEL: Thank you, Your Honor.

(Whereupon, at 3:30 p.m., the hearing in the above entitled matter was adjourned).

Transcribed from electronic recording of proceedings on 8-17-90 by Elizabeth Stacy, Transcriber.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

HOFFMAN CONSTRUCTION)
)
COMPANY OF OREGON,) No. A-89-0072-CIV
)
Plaintiff,)
)
v.)
)
ACTIVE ERECTORS &)
)
INSTALLERS, INC.,)
)
Defendant)

ORDER

Plaintiff's motion to consolidate the trial on the merits with the already held hearing on the plaintiff's motion for preliminary injunction, docket #26, is granted.

I gave notice at the conclusion of the hearing November 7, 1989 that I would consider treating it as the hearing on permanent injunction and as the trial as well, because I saw no likelihood that any new evidence could or would be introduced at the trial which would change the result. This case is the tail end of a dispute going back to 1985, which has already been extensively litigated in state and federal court, to judgment in both places, on various parts, and has already been the subject of an appeal and affirmance in federal court on another related phase. this particular lawsuit is an attempt by Hoffman, in substance the defendant in the previous litigation, to obtain judicial relief against a new attack. Active won a very large money judgment against Hoffman in state court and lost related but distinguishable claims in federal court. After all these events were over, Active demanded that Hoffman submit to arbitration of claims it had lost in federal court.

If this had been a new dispute, i would be very disinclined to treat the hearing on the motion for preliminary injunction and the cross motion to compel arbitration as the last hearing, because Hoffman could be entitled to discovery. But this dispute started in 1984, and the lawsuits were filed in federal and state court in 1984 and 1985, so the parties have had many years to discover the underlined facts. I expected Active's opposition to Hoffman's motion to show what evidence it might put on at a trial which could not be put on or was not put before the court at the hearing on the preliminary injunction. Active, however, makes not showing that it has anything to prove at another hearing or trial. All it does is reargue what has already been decided. Active offers nothing to show that a trial or another hearing would provide the court with any evidence the court did not already have before it when the decision was made

November 7, 1989. the parties' have not provided me with a transcript of the November 7, 1989 hearing, but my recollection is that I could see no genuine issues of material fact with regard to the relief sought in this lawsuit by Hoffman. Active has not enlightened me.

Because the parties did not lodge a transcript, and I no longer recall precisely how my findings were worded, Hoffman is directed to lodge the form of judgment, instead of the court preparing its own. Hoffman shall lodge an appropriate form of judgment by April 10, 1990. If Active objects to the form of the judgment, then it may file its objections and an alternative form within ten days of service by Hoffman

March 21, 1990.

Andrew J. Kleinfeld, Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

HOFFMAN CONSTRUCTION)
)
COMPANY OF OREGON,) No. A-89-0072-
) Civil
Plaintiff,)
) FINDINGS OF FACT
v.)
) CONCLUSIONS OF
ACTIVE ERECTORS &)
) LAW AND PARTIAL
INSTALLERS, INC.,)
) FINAL JUDGMENT
Defendant)

FINDINGS OF FACT

1. On October 11, 1983, Hoffman entered into a contract with the kenai Peninsula Borough (the "prime contract") under which Hoffman would be the general contractor for the construction of the Homer High School.

2. On November 28, 1983, Hoffman entered into a contract with Active erectors & Installers, Inc. (the 'subcontract) which called for Active

Erectors & Installers, Inc. ("Active") to perform structural steel work on the Homer High School Project.

3. The subcontract between Hoffman and Active created two categories of claims which were potentially to be resolved in two different forums. Claims "on account of acts or omissions of the owner" were required to be litigated in Alaska Superior Court. Claims directed against Hoffman were subject to arbitration if a demand for arbitration was filed within 30 days of Hoffman's decision regarding a subcontractor's claim.

4. During the course of work on the Homer High School, a dispute arose among Active, Hoffman and the owner concerning cost overruns.

5. Active then filed a lawsuit in the United States District Court for the Western District of Washington on December

6, 1984. The court adopts and incorporates as part of its findings in this proceeding the decision of the Ninth Circuit Court of Appeals in Sparling, et al. v. Hoffman Construction Co., Inc, reported at 804 F.2d 635 (9th Cir. 1988). That decision recites the procedural background of the proceedings in the Western district of Washington and in this court. that history need not be repeated here again.

6. Active also filed a demand for arbitration on February 4, 1985, in which it asserted claims both against Hoffman directly, pursuant to paragraph XV(d) of the subcontract, and claims 'on account of acts or omissions of owner, or his representatives," pursuant to paragraph XV(b) of the subcontract.

7. Hoffman then filed a declaratory judgment action in the Alaska superior

court at kenai and moved to enjoin Active from pursuing the paragraph XV(b) claims in arbitration.

8 By order dated April 11, 1985, the Alaska Superior Court enjoined Active from pursuing arbitration of claims arising under paragraph XV(b) of the subcontract. A copy of the April 11, 1985 order is attached as Exhibit C to Bringman Aff. in Support of Preliminary Injunction ("Bringman Aff.").

9. The April 11, 1985 order did not, however, enjoin arbitration of claims against Hoffman under paragraph XV(d) of the contract, based upon the alleged actions of Hoffman, and Active remained free to pursue its paragraph XV(d) claims in arbitration.

10. Active chose instead to pursue its paragraph XV(d) claims against HOffman in the Alaska Superior Court action.

11. In a series of letters, Hoffman and Active agreed to permit Active to bring all of its claims against Hoffman under the subcontract in the Alaska Superior Court action, rather than assert paragraph XV(b) claims in one forum and paragraph XV(d) claims in another.

12. In a letter from Edward D. Campbell (counsel for Active) to Richard S. Twiss (counsel for Hoffman), dated April 15, 1985, Active stated that it would prepare pleadings to bring "all of the monetary claims of Active against Hoffman" in the Alaska Superior Court Action. (Bringman Aff., Ex. D.) This letter further stated that Active would withdraw its demand for arbitration when it received assurance that Hoffman would not change its position that all claims against Hoffman could be brought in the Alaska Superior Court action.

13. On October 18, 1985, in a letter to Suzanne Coleman of the American Arbitration Association ("AAA"), Active requested that the arbitration held in abeyance because both parties were attempting to 'have the matters in arbitration heard in the Alaska courts." (Bringman Aff., Ex. F.)

14. On December 27, 1985, Active filed claims against Hoffman in the Alaska Superior Court action. On march 25, 1986, in a letter from Mr. Campbell to Ms. Coleman of AAA, Active expressed its satisfaction that Hoffman would "not raise the arbitrability of any of the disputes" in the Alaska Superior Court action and accordingly stated that it would withdraw its claims against Hoffman from arbitration. (Bringman Aff., Ex. G.) A typographical error in this letter, indicating that Active would "not"

withdraw its claims from arbitration, was corrected by telephone and the correction noted in a March 31, 1986 letter from Ms. Coleman to counsel for both Active and Hoffman, stating that the AAA was closing its file on the case. (Bringman Aff., Ex. H.)

15. Once in Alaska superior Court, Active litigated its claims against Hoffman to judgment, obtaining recovery in the principal amount of $426,343 jointly and severally against Hoffman, Hoffman's surety for the Homer High School project (Seaboard surety Company) and the architects for the project (CTA Architects of Alaska, Inc. and CTA Architects & Engineers, Inc.).

16. On January 12, 1989, Active filed a new demand for arbitration with the AAA, purporting to assert a claim for recovery under the federal RICO statute, 18 U.S.C.

S 1961, et. seq., based on the same transactions that underlay its recovery in the Alaska Superior Court action.

17. On March 7, 1989, Hoffman filed the complaint in this proceeding seeking declaratory and injunctive relief. Specifically, Count I of Hoffman's complaint seeks a declaration that Active cannot assert against Hoffman in arbitration a claim under the federal RICO statute, 18 U.S.C. § 1961, et seq., and a permanent injunction barring such a claim in arbitration. Count II of the complaint seeks a declaration that Active does not have a cognizable claim against Hoffman under RICO in any forum.

18. Along with its complaint, Hoffman filed a motion for preliminary injunction, enjoining Active from asserting against Hoffman in arbitration a claim under the RICO statute. That motion was briefed,

and oral argument heard by the court on November 7, 1989.

19. After briefing and oral argument, I entered a preliminary injunction enjoining Active from asserting a federal RICO claim against Hoffman in arbitration.

20. I gave notice at the conclusion of the hearing on November 7, 1989 that I would consider treating that hearing as a trial on the permanent injunction as well.

21. Hoffman thereafter moved to consolidate further proceedings in the trial on the merits of this action with the preliminary injunction hearing pursuant to Federal Rule of Civil Procedure 65(a)(2). I granted that motion on March 21, 1990, for reasons set out in an order filed on April 3, 1990 (Docket 29).

22. After review of the pleadings on file, oral argument, and for the reasons set out in Hoffman's motion for preliminary injunction, my rulings from the bench and my order of March 21, 1990, I conclude and hereby order that defendant Active Erectors & Installers, Inc. is permanently enjoined from asserting against Hoffman Construction Company of Oregon in arbitration a claim under the Federal RICO statute, 18 U.S.C. § 1961 et seq.

23. I further conclude that since the issues presented by count II of plaintiff's complaint are not before me at this time, the judgment against Active is a partial judgment.

24. Pursuant to Federal Rule of Civil Procedure 54(b), I find no just reason for delay in the entry of said judgment.

25. The clerk is directed to enter a

partial final judgment against Active and in favor of Hoffman as stated in paragraph 22 of these conclusions of law.

Dated at Anchorage, Alaska, this 21st day of May, 1990.

Andrew J. Kleinfeld

U. S. District Court Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

HOFFMAN CONSTRUCTION COMPANY OF OREGON, Plaintiff, v. ACTIVE ERECTORS & INSTALLERS, INC., Defendant	)	No. A-89-0072-Civil ORDER

This matter comes before the court on Hoffman Construction Company's motion for attorney's fees pursuant to Local rule 21.1. Jurisdiction in this matter is based on diversity of citizenship and an award of attorney's fees to the prevailing party under Alaska law is appropriate.

I further find that Hoffman construction Company reasonably incurred attorney's fees in the amount of $16,837.00 in defending this matter. Accordingly, IT IS HEREBY ORDERED that Active Erectors & Installers, Inc., pay Hoffman Construction Company the amount of $12,000.00 in attorney's fees, and

IT IS FURTHER ORDERED that the clerk of court amend the judgment previously entered in this matter to reflect the award of attorney's fees and post-judgment interest thereon against Active.

DATED at Anchorage, Alaska, this 30 day of July, 1990.

Andrew J. Kleinfeld
U.S. District Court Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

HOFFMAN CONSTRUCTION COMPANY OF OREGON, Plaintiff, v. ACTIVE ERECTORS & INSTALLERS, INC., Defendant	No. A-89-072-Civil JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. the issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That Active Erectors & Installers, Inc. is permanently enjoined from asserting against Hoffman Construction Company of Oregon in arbitration a claim under the federal RICO statute, 18 U.S.C. Section 1961 et seq.

Active Erectors & Installers, Inc., to

pay Hoffman Construction Company the amount of $12,000.00 in attorney's fees.

Post judgment interest pursuant to 28 USC 1961 8.24%.

Approved:

Andrew J. Kleinfeld

U.S. District Court Judge

June 1, 1990

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL J. SPARLING; JEAN
SPARLING; ACTIVE ERECTORS
& INSTALLERS, INC.,
Plaintiffs-Appellants,
v.
HOFFMAN CONSTRUCTION
COMPANY, INC; INDUSTRIAL
INDEMNITY COMPANY OF THE
NORTHWEST,
Defendants-Appellees.

Nos 87-3931
87-4436

OPINION

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA
ANDREW KLEINFELD, DISTRICT JUDGE, PRESIDING

Argued and Submitted
November 3, 1988 - Seattle, Washington
Filed December 21, 1988

Before: Dorothy W. Nelson, Robert Boochever and Mellvin Brunetti, Circuit Judges

Opinion by Judge Boochever

Counsel: Edward D. Campbell of Seattle, Washington for appellants and Richard S. Twiss and Joseph E. Bringman of Seattle for appellees.

BOOCHEVER, Circuit Judge:

Michael & Jean Sparling are the sole shareholders of Active Erectors & Installers, Inc. (Active). The Sparlings and Active appeal from the dismissal of their complaint. They contend that for various reasons Active's claims should not have been dismissed; that the change of venue from Washington to Alaska was improper; that the complaint adequately alleged a claim for fraud; that the Sparlings' claims were not derivative of Active's; and the award of attorney fees under Alaska law was improper. We affirm

PROCEDURAL BACKGROUND

On December 6, 1984 the Sparlings and

Active filed suit in U.S. District Court in Washington against Hoffman Construction Co. and Industrial Indemnity Co. of the Northwest. The controversy arose out of a construction contract between Active, a subcontractor, and Hoffman, the general contractor, for the construction of a high school in Homer, Alaska. Active provided payment and performance bonds to Hoffman on which Industrial was the surety. Federal jurisdiction was based on diversity of citizenship.

This complaint was captioned "Complaint to Cancel Bond and for Damages." The appellants later claimed that the gist of the four causes of action in this complaint was that Hoffman fraudulently induced Active to enter this contract and give bonds, and tortiously interfered with known business relations of the sparlings. This is not apparent from the complaint.

Hoffman moved for a more definite statement, to stay proceedings until the matter was arbitrated, and to transfer the action to Alaska. The plaintiffs filed a motion to amend the complaint (even though they could have amended their complaint without leave of the court) and lodged their proposed amended complaint. This complaint would have added RICO claims by Active and the Sparlings.

Without having ruled on the motion to amend, the district judge in Washington dismissed all of Active's claims because the contract between Active and Hoffman required such claims to be submitted to arbitration.

The judge also granted Hoffman's motion to transfer the case to Alaska pursuant to 28 U.S.C. section 1404(a). The plaintiff's subsequent motion for reconsideration was denied.

Hoffman moved the district court in Alaska for a 12(b)(6) dismissal or for summary judgment on the Sparlings' claims. At the hearing on this motion on June 2, 1986, Judge Fitzgerald informed the Sparlings' counsel that the complaint was being dismissed for failure to plead fraud with particularity. the judge informed the Sparlings' counsel of an additional defect in the complaint. He granted the Sparlings twenty days to amend the complaint. He warned that the Sparlings were "going to run out of opportunities to replead this." Referring to the proposed amended complaint, the judge said "I have looked at the amended complaint, and this is going to be the last time out." The next day the order was filed requiring the Sparlings to serve and file an amended complaint within twenty days.

Instead of complying with this order,

twenty-seven days later the sparlings filed a notice of appeal to the Ninth Circuit. This appeal was voluntarily dismissed on September 22, 1986.

On July 15, 1986, Hoffman moved to dismiss with prejudice all claims because of the Sparlings' failure to comply with the order to amend the complaint. In response the Sparlings argued that the district judge's ruling at the June second hearing was unclear, and that they did not know whether the court was granting them leave to amend and whether the court found the proposed amended complaint defective. By an order filed December 19, 1986, the judge denied Hoffman's motion to dismiss and granted the Sparlings twenty days to amend their complaint.

On January 7, 1987 Hoffman again moved to dismiss the complaint because the Sparlings had failed to comply with the order that they amend their complaint to plead fraud with particularity, and because the Sparlings had no standing to assert the corporation's RICO claim. After a hearing, judge Kleinfeld dismissed the first four claims with prejudice because the Sparlings had not corrected the deficiencies despite "plenty of opportunity for discovery, amendment and a warning from Judge Fitzgerald." He dismissed the Sparlings RICO claim, holding that it was a corporate claim and that the Sparlings had therefore not stated a claim upon which relief could be granted. The plaintiffs then voluntarily dismissed Industrial Indemnity.

The court granted Hoffman's motion for attorney fees. Only part of the fees claimed were awarded because the court found the Sparlings' claims were not frivolous or in bad faith and because the fees seemed high and were not itemized. This award was based on Alaska law "because the contract so provides" and "[e]ven if it did not, Alaska law would control under conflict of laws principles.

DISCUSSION

I. The dismissal of Active's Claims

[1] The district court dismissed Active's claims because Active had agreed to submit these claims to arbitration. Active argues that this dismissal was improper for several reasons.

A.

First, Active contends that dismissal was improper because Hoffman only requested a stay pending arbitration, not a dismissal. The fact that a dismissal was not requested, however, does not make it improper. "A trial court may act on its own initiative to note the inadequacy of a complaint and dismiss it for failure to state a claim...." Wong v. Bell, 642 F.2d 359, 361 (9th Cir. 1981) (citing 5 C.Wright & A. Miller, Federal Practice and Procedure S1357 at 583 (1969)). The court must give notice of its intention to dismiss and give the plaintiff some opportunity to respond unless the "[p]laintiffs cannot possibly win relief." Wong, 642 F.2d at 362.

In opposition to the motion for a stay the plaintiffs argues that the arbitration clause did not apply because the plaintiffs were fraudulently induced to enter the contract. As the district court pointed out, however, fraud claims must be submitted to arbitration unless the arbitration clause itself was fraudulently induced. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 588 U.S. 395, 402-04 (1967). The plaintiffs did not claim that the clause itself was fraudulently induced. Thus the plaintiffs could not possibly win relief and the dismissal was appropriate even though it was on the court's own motion.

B.

Second, Active argues that the district court lacked discretion to dismiss Active's claims because the provision for stay in 9 U.S.C. section 3 is the defendant's only remedy where there is an arbitration clause. In Martin Marietta Aluminum, Inc. v. General Electric Co., 586 F.2d 143 (9th Cir. 1978), this court affirmed a district court's grant of summary judgment where the contract provided that a request for arbitration within six months after a controversy arose was a condition precedent to the institution of litigation and where "`[t]he language contained in the arbitration provision is sufficiently broad to bar all of plaintiff's claims.'" *Id.* at 147-48 (quoting the district court opinion). The plaintiff in Martin Marietta argued that 9 U.S.C. section 3 required the defendant to apply for a stay pending compliance with the contractual arbitration clause. This court held that 9 U.S.C. section 3 gives a court authority, upon application by one of the parties, to grant a stay pending arbitration, but does not preclude summary judgment where all claims were barred by an arbitration clause. Thus, the provision did not limit the court's authority to grant a dismissal in this case.

The district court acted within its discretion when it dismissed Active's claims. As in Martin Marietta, the arbitration clause was broad enough to bar all of the plaintiff's claims since it required Active to submit all claims to arbitration.

C.

Third, Active contends that dismissal was improper because a motion to amend the complaint to add a RICO claim was pending, and Active was entitled to the amendment as a matter of right under Rule 15(a) of the Federal Rules of Civil Procedure.

Active's motion to amend was unnecessary. Active could have amended without leave of the court, since no responsive pleading had been filed. ***See*** 6 C. Wright & A. Miller, Federal Practice & Procedure §1480 (1971). The court should have granted this unnecessary request. ***See*** Kirk v. United States, 232 F.2d 763, 770 (9th cir. 1956); Stewart v. RCA Corp., 790 F.2d 624, 631 (7th Cir. 1986). Allowing the amendment however, would not have altered the outcome. RICO claims are arbitrable. Shearson/American Express Inc., v. McMahon, 107 S.Ct. 2332, 2345 (1987). The arbitration provision in the Active-Hoffman contract by its terms applies to any dispute which arises. This provision is broad enough to encompass RICO claims. It is similar to the one the supreme court held required submission of RICO claims to arbitration in Shearson. ***See*** 107 S.Ct. at 2335-36. Thus the trial judge's dismissal of Active's claims necessarily included the proposed RICO claim.

D.

Fourth, Active argues dismissal was improper because Active was a "necessary party" under rule 19(a) of the Federal Rules of Civil Procedure. Rule 19, however, does not require that a party without a claim nonetheless be allowed to assert one.

E.

Fifth, Active argues that dismissal was improper because Hoffman waived arbitration in favor of proceedings in Alaska State Court. The arbitration clause in the contract states that it may be waived if the parties mutually agree. The scope of a waiver would be governed by the agreement. Hoffman only waived the arbitration clause in favor of ongoing state court proceedings, not the federal action.

The trial court did not err in dismissing Active.

II. Transfer to Alaska

The Appellants contend that the transfer to Alaska was improper. We review a transfer under 28 U.S.C. 1404(a) for abuse of discretion. "Weighing of factors for and against transfer involves subtle considerations and is best left to the discretion of the trial judge." Commodity Futures Trading Comm'n v. Savage, 611 F.2d 270, 279 (9th cir. 1979). Section 1404(a) gives the district court discretion to order a transfer "[f]or the convenience of parties and witnesses, in the interest of justice."

The district judge found that there were competing factors for and against transfer, which he listed, but the fact that the owner of the project appeared to be likely third party defendant and probably would not be subject to personal jurisdiction in Washington 'decidedly tilts the scales in favor of the Alaska venue." He held that "[t]he ability to join all appropriate parties and avoid duplicative litigation, along with the convenience arguments raised by Defendant as well as the fact that many third party witnesses...will have to travel no matter where the trial is held, require the transfer of this case to the Alaska venue."

The Sparlings argue that the court was factually wrong on the issue of ability to join all appropriate parties, because the contract between the owner and Hoffman contained a forum selection clause providing that claims arising our of the contract could only be filed and prosecuted in Kenai, Alaska, and the owner could not therefore be made a party to a suit in Anchorage. In their brief on the motion for reconsideration, the appellants pointed out this alleged error, and the judge denied the motion. It is not clear that the court was wrong. For example, if the suit had proceeded to the merits, Hoffman might have been able to show that the forum selection clause should not be enforced because enforcement would require

Hoffman to litigate the issues in two fora, and therefore 'enforcement would be unreasonable and unjust." *See* Manetti-Farrow, Inc. v. Gucci America, Inc., 858 F.2d 508, 512 (9th Cir. 1988) (quoting The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972)) Alternatively, the owner might have waived the forum selection clause in favor of the Anchorage venue.

[2] The judge carefully considered and listed the factors weighing for and against the transfer before ordering it. He did not change the order after being informed of his alleged mistake regarding one factor. Given the possibility that the owner could have been made a party in Alaska, and the careful consideration that the trial judge gave to the competing factors, we cannot say the transfer was an abuse of discretion.

III. Dismissal of the Sparlings' Fraud

Claims

The Sparlings argue that the June second ruling dismissing the original complaint for failure to plead fraud with particularity was improper. They claim that the judge was required to allow the amendment and consider the proposed amended complaint before ruling on the motion to dismiss. Thus, they argue, the dismissal with prejudice seven months later for failure to comply with the June third order to amend their complaint within twenty days was improper.

[3] This argument is meritless. At the June second hearing the judge told the Sparlings' counsel that he had 'looked at the amended complaint and this [was] going to be the last time out" and that they must file a new amended complaint within twenty days. Thus, he told them that the proposed amended complaint was deficient

and allowed them to file a new one. Nonetheless, seven months later when they finally filed an amended complaint, they simply refiled this complaint! Furthermore, the complaint that they ultimately filed was almost identical to the original complaint dismissed on June second. It was not improved in any respect to comply with the order to plead fraud with particularity.

The dismissal was proper. The Sparlings failed to comply with the order to amend, instead improperly appealing the order. Nonetheless, six months later the court gave them another chance to amend their complaint. Instead of complying with the June third order by correcting the deficiencies they refiled the complaint the judge told them was defective at the June second hearing.

[4] The Sparlings also argue that the

dismissal was improper because, if every "cause of action" in the complaint is examined, all of the factual elements of fraud may be found. Even if this were true, the complaint would be deficient under Rule 8(a) of the Federal Rules of Civil Procedure, which requires "a short and plain statement of the claim showing that the pleader is entitled to relief."

IV. Dismissal of the Sparlings' RICO claim

The court dismissed the Sparlings' RICO claim for failure to state a claim on which relief could be granted, holding that "it is the corporation's claim and not the Sparlings' claim."

The Sparlings contend that as shareholders in Active and guarantors of the bonds given by Active they have standing to assert the RICO claim. They claim this is supported by Sedima, S.P.R.L. v. Imrex, 473 U.S. 479, 495 (1985), and Haroco v. American Nat'l Bank & Trust Co., 747 F.2d 384 (7th Cir. 1984), aff'd 473 U.S. 606 (1985). Those cases, however, did not discuss shareholder or guarantor standing to assert RICO claims based on injuries to the corporation. Rather they dealt with the type of injury required to state a RICO claim.

This Circuit apparently has not considered the issue of shareholder or guarantor standing to assert RICO claims. Those circuits that have considered the issue, however, are unanimous in holding that there is no shareholder standing to assert RICO claims where the harm is derivative of harm to the corporation. *See* Roeder v. Alpha Industries, Inc., 814 F.2d 22, 29-30 (1st Cir. 1987); Rand v. Anaconda-Ericsson, Inc., 794 F.2d 843, 849 (2nd Cir. 1986), ***cert. denied***, 479 U.S.

987 (1986); Crocker v. FDIC, 826 F.2d 347, 349 (5th Cir. 1987), ***cert. denied***, 108 S.Ct. 1075 (1988); Gaff v. FDIC, 814 F.2d 311, 315, ***vacated on other grounds***, 828 F.2d 1145 (6th Cir. 1987).

The First, Second, Fifth and Sixth Circuits look to general corporate law to determine if a RICO claim is for harm derivative of the harm to the corporation or for individual harm. If it is derivative, the shareholder has no standing to assert the RICO claim. ***See*** Roeder, 814 F.2d at 29-30; Rand, 794 F.2d at 84; Crocker, 826 F.2d at 349; Gaff, 814 F.2d at 315. The seventh Circuit has accepted the principle as well: "the investors in the firm suffer when the firm incurs a loss, yet only the firm may vindicate the rights at issue.... these principles should apply to RICO cases...." Carter v. Berger, 777 F.2d 1173, 1175 (7th

Cir. 1985).

[5] The Sparlings argue that their harm is not derivative, but direct. This argument has no merit. The Sparlings must show either an injury distinct from that to other shareholders or a special duty between Hoffman and the Sparlings if they are to have standing to assert RICO claims based on injury to the corporation. ***See. e.g.*** Hikita v. Nichiro Gyogyo Kaisha, Ltd., 713 P.2d 1197, 1199 (alaska 1986); Hunter v. Knight, Vale & Gregory, 18 Wash.App. 640, 644-45, 571 P.2d 212, 215-16 (1977)(citing 13 W. Fletcher, Cyclopedia of the Law of Private Corporations §5927 (perm.ed.rev. 1970). The wrong alleged is a fraud on the corporation. Because they are the sole shareholders they cannot show an injury distinct from that to other shareholders. Nor was there a special relationship

between the Sparlings and Hoffman which would create the kind of duty required. Thus, the court was correct in ruling that they had no standing as shareholders to assert a RICO claim.

Any harm to the Sparlings due to their status as guarantors of the bonds given by the corporation is also derivative of the harm to the corporation. Thus, this status does not give the Sparlings standing. ***See generally*** Artic Contractors, Inc v. State, 573 P.2d 1385, 1386 (Alaska 1978).

V. Attorney's Fees

The appellants contend that Washington law controls this case, and the judge thus erred in awarding attorney's fees under Alaska law. We review the District Court's choice of law de novo. Pereira v. Utah Transport, Inc., 764 F.2d 686, 689 (9th cir. 1985), ***cert. dismissed***, 475 U.S.

1040.

Because the complaint was originally filed in Washington, Washington's choice of law rules apply. ***See*** Van Dusen v. Barrack, 376 U.s. 612, 639 (1964); General Accident Ins. Co. v. Namesnik, 790 F.2d 1397, 1398, ***amended,*** 799 F.2d 539 (9th cir. 1986). Washington law gives effect to an express choice of law clause in a contract as long as application of the chosen law does not violate Washington's fundamental public policy. McGill v. Hill, 31 Wash.App. 542, 547, 644 P.2d 680, 683 (1982).

The general contract between Hoffman and the owner provided that "[a]ny litigation which may be brought upon this contract or upon any claims arising our of this contract, shall be governed by the laws of the State of Alaska." This provision was incorporated into the subcontract between Hoffman and Active. The appellants argue that the contractual provision does not apply to fraud and Rico claims, and since those were the bases of the complaint the choice of law provision should not control the award of attorney's fees. There are apparently no Washington cases on the issue. Assuming Washington courts would accept the traditional view, unless the choice of law provision itself was obtained by a misrepresentation it will be given effect. *See* Restatement (Second) Conflict of Laws §201 comment c (1971). The appellants do not argue that the clause was obtained by misrepresentation. Thus it must be given effect.

[6] The plaintiff's claims were based on the allegation that Hoffman misrepresented the true scope of the work, inducing Active to sign the subcontract to

its detriment. The choice of law provision applies to these claims. The award of attorney's fees under Alaska law was appropriate.

CONCLUSION

The court did not err in dismissing Active's claims because Active agreed to submit such claims to arbitration. The transfer to Alaska was not an abuse of discretion. The dismissal of the Sparlings' fraud claims for failure to correct a defect in their fraud pleading was not error. The dismissal of Sparlings' RICO claim for lack of standing was proper. The application of Alaska law to the attorney's fees decision was correct because of the choice of law provision in the contract. AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HOFFMAN CONSTRUCTION)
)
COMPANY OF OREGON,) NO. 90-35523
)
Plaintiff,) D.C. No. CV-89
)
v.) 0072-AJK
)
ACTIVE ERECTORS &) ORDER
)
INSTALLERS, INC.,)
)
Defendant)

Before Tang, Reinhardt and Rymer, Circuit Judges

The majority of the panel has voted to deny the petition for rehearing. Judge Reinhardt would grant the petition for rehearing. The panel has unanimously voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc.

Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.

FILED AUGUST 20, 1992, Cathy A Catterson, Clerk, U.S. Court of Appeals.

STATUTES

9 U.S.C. §3. (Federal Arbitration Act)

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. §4 states in part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days notice in writing of such application shall be served upon the party in default. Service thereof shall be in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the

court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

18 U.S.C. §1341. Frauds and swindles (Mail fraud)

Whoever, having devised or intended to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, ... for the purposes of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the directions thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. §1961. Definitions (Racketeering Influence and Corrupt Organizations Act--RICO)

As used in this chapter --

(1) "racketeering activity" means ... (B) any act which is indictable under any of the following provisions of title 18, United States Code: ... section 1341 (relating to mail fraud)....

(3) "person" includes any individual or entity capable of holding legal or beneficial interest in property;

(4) "enterprise" includes any individual partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the

effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

18 U.S.C. § 1962. Prohibited Activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United Stated Code, to use or invest, directly or indirectly, any part of such income, or proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. ....

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of any unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce , to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. § 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ... making due provision for the rights of innocent persons.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the costs of the suit, including a reasonable attorney fee.

28 U.S.C. § 1331:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1332(a)(1):

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between--

(1) citizens of different States;....

28 U.S.C. § 1738:

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and

Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 2201(a):

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of Canadian merchandise, as determined by the administrating authority, any court of the United States, upon the filing of the appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final decree and shall be reviewable as such.

28 U.S.C. § 2202:

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

DISPUTES RESOLUTION CLAUSES IN HOFFMAN PRINTED SUBCONTRACT.

XV (a) Should Owner file a claim, counterclaim or cross claim against Contractor relating to, or arising out of, in whole or part, performance of Subcontractor's Work, Subcontractor and its surety agree to be bound to Contractor to the same extent that Contractor is bound to Owner by the terms of the Contract and shall likewise be bound by all rulings, decisions or determinations made pursuant to the Contract including but not limited to the final decision of an appeal board, arbitration or court of competent jurisdiction, whether or not Subcontractor or its surety is a party to such proceeding. If called for by contractor, Subcontractor shall defend, at no cost to contractor, all claims, or that portion thereof, relating to or arising out of the performance of Subcontractor's Work, and shall become a party to such proceeding or determination.

(b) As to any claim by Subcontractor on account of acts or omissions of Owner, or his representatives, contractor agrees to present to Owner, in Contractor's name, all of subcontractor's claims for extra's and equitable adjustments and to further invoke on behalf of Subcontractor those provisions of the Contract for determining disputes. Subcontractor shall have full responsibility for preparation and presentation of such claims and shall bear all expenses thereof, including attorneys' fees. subcontractor agrees to be bound by the procedure and final determinations as specified in the Contract and agrees that it will not take any other action with respect to any such claims and will pursue no independent litigation with respect thereto or any disputes resolution procedures. subcontractor shall not be entitled to receive any greater amount from contractor than Contractor is entitled to and actually does receive from Owner on account of Subcontractor's claims, less any markups entitled to or costs incurred by Contractor. Subcontractor shall accept such amount, if any, as full discharge of all such claims. with respect to such claims, Subcontractor shall give written notice to Contractor within sufficient time top permit Contractor to give notice to Owner within the time allowed by the Contract. Failure to give such notice shall constitute a waiver of such claims.

(c) Notwithstanding paragraph (b) of this Section, Contractor shall have the right, at any time, to settle or otherwise dispose of any claim by Subcontractor on account of acts or omissions of Owner or his representatives. Should Contractor exercise this right, Contractor shall determine the amount, if any, to be paid to Subcontractor on account of such claim. Such decision shall be final and binding unless Contractor's decision is submitted to arbitration in accordance with paragraph (d) of this Section.

(d) Should a dispute arise which is not controlled or determined by the above paragraphs of this Section or other provisions of this Subcontract then said dispute shall be settled by Contractor's written decision with respect to such dispute. Such written decision shall be conclusive and shall be final and binding on Subcontractor and its surety unless Subcontractor, within thirty (30) days following the receipt of such written decision, shall file a demand for arbitration in accordance with the then current rules of the Construction Industry Arbitration Rules of the American Arbitration Association, unless the parties mutually agree otherwise. If such demand is filed, then the dispute shall be decided by arbitration in accordance with such Rules. This agreement to arbitrate shall be specifically enforceable and the arbitration decision shall be final and binding as between the Contractor and Subcontractor and its surety. If arbitration is conducted involving Owner, Contractor or any other party concerning or in any way relating to responsibility under this Subcontract, any dispute relating to the Work required or alleged to be required herein, this Subcontract, or Subcontractor, then in any of these events, Subcontractor expressly agrees to a consolidation or joint arbitration if and as called for by Contractor.

(e) Subcontractor shall proceed diligently with the Work pending final determination of any dispute or claim.

(f) The provisions of this Section shall survive the completion or termination of this Subcontract.

(g) Subcontractor covenants and expressly agrees that if for any reason the Subcontract is not completed as contemplated herein or it any dispute shall arise over the entitlement or the rights of Subcontractor, Subcontractor's sole recourse shall be an action as provided herein to enforce the several terms and provisions of this Subcontract, and no action shall lie in favor of Subcontractor in the nature of quantum meruit, quantum valebant, quasi-contract, or any other theory of law or equity.

ALLEGATIONS IN ACTIVE'S 2ND ARBITRATION ACTION:

Hoffman Construction Company, together with others, including CTA Architects & Engineers, CTA of Alaska, and others were associated in fact and engaged in the enterprise of the Borough of Kenai, Alaska, a legal entity as described in 18 U.S.C. {1961(4), in the construction of a high school and community center at Homer, Alaska, which has involved activities and supplies and materials gathered from several states, including Washington, Alaska, Montana, and Oregon and a foreign nation, Canada,

Hoffman Construction Company together with others, in conducting or participating in the conduct of the enterprise or affairs before described, directly or indirectly, have devised or intended to devise schemes or artifices to obtain from Active Erectors & Installers, Inc., and others, property and money by means of false and fraudulent pretenses, which have been found as a matter of law between the parties by the Alaska Superior Court to have been fraudulent misrepresentation by Hoffman Construction Company through intentionally failing to communicate the information to Active Erectors & Installers, Inc. with respect to the quality of the CTA contract drawings and the Hoffman Foundation drawings, and in furtherance thereof, on or about the following dates, November 28, 1983, December 6, 1983, December 15, 1983 and January 8, 1984 and on other dates, for the purposes of executing such schemes and artifices or attempting to do so, did place in the United States Post Offices or authorized depositories for mail matter, materials and things, to wit contracts, plans, specifications, drawings, letters, and other information, to be sent or delivered by mail according to the directions thereon addressed to Active Erectors & Installers, Inc., AA Fabricators, Inc., and others.

Each of the mailings set forth above is a separate violation of 18 U.S.C. {1341 and together amount to violations of 18 U.S.C {1962 in that Hoffman Construction Company and others, or some of them have received or derived income, directly or indirectly from a pattern of racketeering activity as defined in 18 U.S.C. {1961 (5).

As a result of aforesaid action of Hoffman Construction Company and others, Active Erectors & Installers, Inc., was damaged in the amount of $426,343.00 together with prejudgment interest in the sum of $144,120.72 as determined by the

Superior Court of Alaska and confirmed by judgment entered on March 10, 1988 from which no appeal has been taken. Furthermore, Active Erectors & Installers, Inc., was enjoined from pursuing arbitration concerning the nature and amount of its damages from April 11, 1985 until said case was concluded by judgment entered on March 10, 1988 by the Superior Court of Alaska.

Furthermore, as a result of the bifurcation of the damage action from this arbitration, it has been necessary to pursue two actions and Active Erectors & Installers, Inc., has been further damaged to the extent that it had to pay additional costs and attorney fees over and above what such costs and attorney fees should have been had this action not been bifurcated by Hoffman's action. The Alaska court awarded an additional

$59,546.00 in attorney fees however the actual fees were $200,000.00. The Alaska court also awarded $59,546.00 in costs. Actual costs were $234,519.16 for the Alaska litigation.

Hoffman Construction Company should be given credit for amounts paid of $426,343.00 together with $144,120.72 in prejudgment interest but the total of that amount, $570,463,72, should be doubled to $1,140,927.44 and that should be added together with additional costs and fees caused by bifurcating this action, which should be tripled, so that Active Erectors may recover the full amount of damages required by 18 U.S.C. {1964 (c) and to that should be added a reasonable attorney fee herein as required by 18 U.S.C. {1964 (c).